

STAMP & RETURN

Lowell W. Paxson - Chairman

September 2, 2003

Commissioner Jonathan S. Adelstein
Federal Communications Commission
The Portals
445 12th Street SW
Room 8-C302
Washington, DC 20554

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Federal Communication Commission
Bureau / Office

Re: Full Digital Multicast Must-Carry,
CS Docket No. 98-120

Dear Commissioner Adelstein:

On behalf of Paxson Communications Corporation ("PCC"), I would like to offer this response to several arguments recently raised by Comcast Corporation in an August 7, 2003 *Ex Parte* letter following a meeting with your office.

In its letter, Comcast simply repeats the same tired arguments against DTV must-carry that cable has been making for years now. It is becoming clearer every day, however, that the only way to ensure the public interest in a smooth transition to DTV and the return of valuable and much needed spectrum is to order full digital multicast must-carry as soon as possible. The Commission already has a record that fully supports this course and ample statutory authority that has been confirmed by the Supreme Court. The Commission must reject cable operators' attempts to turn the clock back and ignore the Court's decision in *Turner Broadcasting*. Instead, the Commission should look to the future, and ensure full and free over-the air DTV service by ordering full digital multicast must-carry. Toward that end, PCC offers these observations on three arguments raised by Comcast.

1. **FULL DIGITAL MULTICAST MUST-CARRY DOES NOT VIOLATE CABLE OPERATORS' FIRST OR FIFTH AMENDMENT RIGHTS**

Cable operators have raised Constitutional arguments against multicast must-carry in the past but with no success. The Supreme Court fully resolved the First Amendment issues surrounding must-carry in the *Turner* cases. Cable operators' argument that the transition to DTV somehow alters the Supreme Court's decision on this matter is puzzling, and reflects a backward-looking desire to refight a lost battle. The record in this proceeding indicates that the imposition of multicast must-carry would place no more burden on cable operators and would advance the same important government interests identified by the *Turner* court. Thus, the question of multicast must-carry presents no new First Amendment issues, and, given the 6-year old *Turner* precedent, it is unlikely



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that the Supreme Court would even grant a hearing on a First Amendment challenge to multicast must-carry, let alone uphold one.

Cable operators' reference to the fact that *Turner* was decided by a 5-4 vote of the Supreme Court justices is more bizarre still. Supreme Court decisions are the law of the land – binding on the Commission and cable operators alike – regardless of the split of the justices. Moreover, the same justices currently sit on the Supreme Court as heard *Turner II*, and eight of the nine currently sitting justices heard *Turner I*. There is simply no reason to believe these same justices, presented with essentially the same facts, would decide the multicast must-carry issue any differently than they did the original must-carry issue.

Moreover, no court ever has accepted cable operators' Fifth Amendment takings argument against any form of must-carry. It is difficult to imagine that the Supreme Court would have upheld must-carry against constitutional challenge if it believed that the Fifth Amendment would thereby be violated, but the Supreme Court never had a chance to pass on the Fifth Amendment issue because cable operators withdrew it. Cable operators' history of making, then withdrawing, then reasserting their Fifth Amendment claims makes it rather hard to take the argument seriously. It seems that cable operators simply hold this argument as a litigation threat to the Commission whenever a new must-carry issue presents itself.

The Commission should not be persuaded or misled by these arguments. Today, full digital multicast must-carry is every bit as sound legally as analog must-carry was when *Turner II* was decided. Cable operators' unfounded Constitutional arguments and thinly veiled litigation threats can safely be ignored. In fact, since the FCC's initial decision in this proceeding in January, 2001, the issue of the legality of full digital multicast must carry has been more fully briefed before this agency than the issue was briefed before the Supreme Court in *Turner Broadcasting*. Every major party to the Supreme Court's review of the must carry rules has now submitted comprehensive briefs to the FCC on digital must carry. There is no position that has not been fully and adequately presented on the legality of digital must carry.

2. THE "PRIMARY VIDEO" LANGUAGE IS IRRELEVANT TO THE MULTICAST MUST-CARRY

The "primary video" argument has long been a favorite of the cable industry, but it simply does not impact on the legality of multicast must carry because it ignores the relevant statutory language governing which broadcast signals, and what parts of those signals, must be carried. Congress demonstrated in Section 614 of the 1992 Cable Act that it intends all free over-the-air broadcast services to be carried on cable systems.

The 1992 Cable Act not only fully anticipated digital must carry, it anticipated the Commission's role in putting it into effect. Congress clearly directed the Commission to make rules regarding the technical changes needed to ensure carriage and nothing



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more. The Act provides that the Commission shall initiate proceedings “to establish any changes in the signal carriage requirements of cable television systems necessary to insure cable carriage of broadcast signals of local commercial television stations which have been changed to conform with such modified standards.” The legislative history of this provision makes it clear that Congress intended the Commission to take whatever steps were necessary, from a technical standpoint, to insure that television broadcasters’ digital signals (just as with their analog signals) are carried by local cable systems. The House Report interpreting the above language noted that:

The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.

The Commission’s mandate was clear: make whatever technical changes are necessary to ensure continued mandatory carriage of local television stations in the digital world. This mandate from Congress was contained in the section of the must carry provisions of the 1992 Cable Act dealing with the technical aspects of must carry, (e.g., signal degradation). The placement of the digital must carry discussion in this same section is indicative of the Congressional intent that the question of must carry was not at issue, just the technical aspects. Any actions concerning cable carriage matters beyond such technical aspects of digital must carry are beyond the scope of the Commission’s statutory mandate.

In addition, Section 614(b)(3)(A) of the 1992 Cable Act states that cable operators “shall carry, in its entirety . . . the primary video, accompanying audio . . . and, to the extent technically feasible, programming-related material carried in the vertical blanking interval or on subcarriers.

The second half of Section 614(b)(3) then states:

The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under [the Commission’s rules regarding nonduplication protection and syndicated exclusivity and sports broadcasting].

Thus, the Commission’s unnecessary reading of “primary video” (as meaning only one programming stream) conflicts with the policy and plain language of Section 614(b)(3)(B) – if a cable operator is not carrying the multicast programming of a digital station, it cannot be carrying the entirety of the television station’s programming schedule.



The 1992 Cable Act does not distinguish between analog and digital. Analog broadcasters carry the entirety of their programming schedule on a single video stream, while digital broadcasters may carry different parts of their programming schedule on multiple video streams. Nothing in the 1992 Cable Act allows the abridgment of the broadcaster's programming schedule on the basis of the number of video streams used to deliver that programming. In fact, Section 614(b)(3)(B) of the 1992 Cable Act specifically states that the only allowable reason for carrying less than the entirety of the broadcaster's programming schedule is to ensure compliance with the Commission's rules regarding nonduplication protection, syndicated exclusivity and sports broadcasting. The Commission was not free to create exceptions in addition to those specified by Congress. As such, the entirety of the programming schedule is entitled to cable carriage regardless of whether broadcasters carry programming on one video stream or several video streams.

The "primary video" language was not intended to be a limitation on digital must carry. It was rather used by Congress in Section 614(b)(3)(A) to distinguish broadcaster's free programming streams from the ancillary and supplementary services (which are secondary to, or *derived from*, the "primary video") but which are not entitled to must carry. Accordingly, primary video as used in the 1992 Cable Act includes all free, over-the-air multicast signals of television stations.

3. CABLE OPERATORS ARE NOT ENTERING INTO VOLUNTARY DTV CARRIAGE AGREEMENTS WITH LOCAL BROADCASTERS

Finally, the cable industry's claims that multicast must-carry is unnecessary because carriage of DTV stations is being negotiated successfully is simply wrong. PCC's experience is directly to the contrary. Cable operators generally will not discuss DTV carriage with PCC and when they do, they refuse to consider multicast must-carry. It is a matter of record before the Commission that most broadcasters, including public broadcasters, have had similar experiences.

Nonetheless, while the cable industry trumpets the few *HDTV agreements* it has entered as proof that *multicast must-carry* is unnecessary, the fact is that these agreements are rare indeed.

Must-carry never has been about ensuring carriage for stations – such as the major network affiliates currently broadcasting in HDTV – that would be carried anyway. The voluntary HDTV carriage agreements with major network affiliates in the top markets, cited by cable, do not even begin to satisfy any of the important statutory goals furthered by must-carry. Must-carry is about ensuring that all broadcasters are entitled to carriage so that even if cable operators do not wish to negotiate carriage agreements, the U.S. system of free over-the-air broadcasting is preserved in its current vigorous form.



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Cable's attitude regarding DTV carriage is unsurprising, given its near monopoly position. Most cable operators would prefer not to have to deal with the competition and headaches that a full digital multicast marketplace would present. The public interest, however, demands that broadcasters have the opportunity both to broadcast in HD and to multicast. As PCC has shown in the past, some stations may never broadcast primarily in HD due to the expense and the nature of the programming they offer. At the same time, multicasting is an important DTV innovation and its implementation may eventually create greater consumer benefits than HDTV. Cable operators should not be permitted to limit broadcasters' use of the digital spectrum by insisting on HDTV programming before engaging in carriage negotiations. To allow cable operators to control broadcasters' conduct in this way would make a mockery of Congress's intent in establishing the must-carry regime in the first place.

With multicast must-carry, the Commission has been given a chance not only to preserve free over-the-air broadcasting against cable's anti-competitive inclinations, but to strengthen free over-the-air service to all viewers. Cable operators still have not explained what the negative effects of this improvement would be. Indeed PCC submits this is because there will be no such effects. The end result of full digital multicast must-carry will be improved service and increased choice for the public in exchange for a continued use of cable bandwidth that is well within the one-third limit set by Congress. Cable operators and their wholly owned subsidiary networks may not like the competition, but fostering that competition is what Congress has instructed the Commission to do. To stay true to these mandates, the Commission must order full multicast must-carry as soon as possible to bring the benefits of DTV, increased service, and greater competition to every over-the-air and cable television viewer in America.

And finally, full digital multicast must carry will effectively turn a single television station into a source of multiple local voices of programming able to reach the entire local market. This unprecedented opportunity to actually increase the number of local television voices is simply awaiting FCC action. Localism and diversity will be the real winners – more truly local voices subject to the FCC's oversight and much more diversity to challenge the cable monolith. This is a rare and exciting opportunity for this FCC.

Very truly yours,

Lowell W. Paxson
Chairman & CEO

Paxson Communications Corporation

cc: Johanna Mikes